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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF ALASKA**  
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9 **COREEN RENEE NOBLE and** )  
10 **ROBERT NOBLE,** )  
11 **Plaintiffs,** ) **1:07-cv-00004 JWS**  
12 **vs.** ) **ORDER AND OPINION**  
13 **UNITED STATES OF AMERICA,** ) **[Re: Motion at docket 70]**  
14 **Defendant.** )  
15 \_\_\_\_\_ )  
16

17 **I. MOTION PRESENTED**

18 At docket 70 plaintiffs Coreen Renee Noble (“Coreen”) and her husband Robert  
19 Noble (collectively “Nobles”) ask the court to apply the presumption created in *Sweet v.*  
20 *Sisters of Providence*<sup>1</sup> to three affirmative defenses pled by defendant United States.  
21 The United States’ response is at docket 80, and plaintiffs reply at docket 85. Oral  
22 argument was not requested, and it would not be of material assistance to the court.  
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24 **II. BACKGROUND**

25 Coreen is an Alaska Native for whom medical care is provided by the United  
26 States. The Nobles lived in Kake, Alaska, a small and relatively remote village in  
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28 <sup>1</sup>895 P.2d 484 (Alaska 1995).

1 Southeast Alaska. In January of 2004, Coreen was diagnosed with a severe form of  
2 Stevens-Johnson Syndrome ("SJS"), a potentially fatal disease. SJS may cause severe  
3 damage to the skin and membranes in the eyes, mouth, and digestive tract. Coreen  
4 was sent to Harborview Medical Center in Seattle where she received the specialty care  
5 required for her SJS.  
6

7 In March of 2004, Coreen returned to Kake. Thereafter, she received medical  
8 care for her eyes in Kake, Sitka, and Anchorage. Ultimately, her left eye deteriorated to  
9 the point that it was removed on April 5, 2005. In 2006, the Nobles filed an  
10 administrative claim seeking redress for allegedly negligent medical care provided to  
11 Coreen after she returned to Kake. In 2007, the Nobles filed this Federal Tort Claims  
12 Act lawsuit against the United States. Coreen seeks compensatory damages for  
13 injuries allegedly caused by the medical malpractice of health care providers for whom  
14 the United States is responsible. Her husband seeks damages for loss of consortium.  
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### 16 **III. DISCUSSION**

17 In *Sweet* the Alaska Supreme Court held that when a medical malpractice  
18 plaintiff's ability to prove her negligence claim has been impaired by a defendant's  
19 breach of a duty to create or maintain adequate records, the trial court should shift the  
20 burden of proof to the defendant such that the defendant must prove that it was not  
21 negligent.<sup>2</sup> The effect of shifting the burden of proof creates a rebuttable presumption  
22 that the defendant was negligent. The burden shifting may only be used where a  
23 plaintiff (1) proves that her ability to establish a *prima facie* case of negligence has been  
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27 <sup>2</sup>*Id.* at 492.

1 impaired by the lack of records, and (2) she also proves that lack of records resulted  
2 from defendant's negligence or other fault.<sup>2</sup> The *Sweet* presumption may be applied to  
3 the United States in a medical malpractice action under the Federal Tort Claims Act.<sup>3</sup>  
4

5 The Nobles ask the court to apply the *Sweet* presumption to "three affirmative  
6 defenses" which may be used by the United States as follows: "1. Coreen Noble failed  
7 to follow medical advice to move out-of-state to a specialized care facility in the Lower  
8 48; 2. Coreen Noble was referred to specialized physicians in the Lower 48; 3. Coreen  
9 Noble was noncompliant with referrals—she failed to attend scheduled appointments."<sup>4</sup>  
10 However, the United States has not pled such affirmative defenses in its Answer.<sup>5</sup> It  
11 appears that the three "affirmative defenses" are more aptly described as "potential  
12 defense arguments," the terminology used in the United States' response to the  
13 motion.<sup>6</sup>  
14

15 Neither party has cited a case in which the *Sweet* presumption was applied to an  
16 affirmative defense or an argument made by a defendant seeking to overcome a  
17 plaintiff's *prima facie* case. Nor has the court found such a case. Reflection suggests  
18 that the absence of case law in such a circumstance flows inevitably from the first  
19 requirement for invoking the presumption. As noted above, in order to invoke the  
20 presumption, the first thing a plaintiff must do is to show that a lack of records impairs  
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23 <sup>2</sup>*Id.* at 491.

24 <sup>3</sup>*Nayokpuk v. United States*, 848 F. Supp. 2d 1030, 1035 (D. Alaska 2012).

25 <sup>4</sup>Doc. 70 at p. 1.

26 <sup>5</sup>Doc. 5.

27 <sup>6</sup>Doc. 80 at p. 1.

1 her ability to present a *prima facie* case.<sup>7</sup> Any defense argument, including the ones  
2 identified by plaintiffs, would come only after the Nobles have put on their case.  
3 Defense arguments presented after the close of the Nobles' case cannot logically be  
4 said to impair what the Nobles will already have accomplished. In short, the request for  
5 application of the *Sweet* presumption fails on the first prong of the test laid out in the  
6 *Sweet* decision itself.<sup>8</sup> Given that conclusion, the court finds it unnecessary to consider  
7 any of the other arguments advanced by the parties.  
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9 It may be that one or more of the health care providers will testify that he  
10 recommended that Coreen seek care Outside, referred her to specialists Outside, or  
11 that she did not attend scheduled appointments. If so, the remedy for the Nobles lies in  
12 cross examination. For example, if a doctor testifies that he told Coreen to move  
13 Outside where better care could be provided, he can be asked on cross-examination  
14 whether that was an important recommendation to his patient, followed by an inquiry as  
15 to where that important recommendation is found in the medical records, followed by an  
16 inquiry asking that if it was so important why is it not documented in the medical  
17 records.  
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#### 20 **IV. CONCLUSION AND RECOMMENDATION TO COUNSEL**

21 For the preceding reasons, the motion at docket 70 is **DENIED**.  
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25 <sup>7</sup>*Sweet*, 895 P.2d at 491.

26 <sup>8</sup>The *Sweet* presumption may also sometimes be applied as a discovery sanction. See  
27 discussion in *Nayokpuk*, *supra*. However, the Nobles do not point to any discovery abuse by  
28 defendant as a basis for imposing a *Sweet* presumption as a sanction.

The court writes further to suggest that counsel consider participating in a settlement conference. To that end, counsel shall confer with their clients and then within fourteen (14) days advise the court whether they would like a settlement judge appointed and whether any settlement conference that might be conducted should be held in Anchorage or, if possible, in Juneau. Given that the Nobles now live in Oregon, travel to Anchorage would likely be easier for plaintiffs than travel to Juneau. It would also be much more efficient for an Anchorage based judge to hold the conference in Anchorage.

DATED this 31st day of July 2013.

/s/  
JOHN W. SEDWICK  
UNITED STATES DISTRICT JUDGE